June 19, 2020

TO: Rod Rasmussen, SSAC Chair
FROM: Keith Drazek, GNSO Chair
SUBJECT: GNSO Council Response to SAC111 Comments on EPDP Phase 2 Management

The GNSO Council acknowledges receipt of SAC111 and the SSAC's comments submitted on the Phase 2 Initial Report of the Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD Registration Data and would like to respond to some of the comments or recommendations contained in SAC111.

Under ICANN Bylaws, the GNSO has the mandate to develop and recommend to the Board substantive policies relating to gTLDs while the role of the SSAC is to advise the ICANN community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. Notwithstanding their very different roles and responsibilities, the GNSO Council made a deliberate choice to invite representatives from the SSAC and other Advisory Committees to participate in the EPDP. The EPDP Team composition was based on a new "representative model" as part of PDP 3.0 Improvements and was intended to be as inclusive and representative as possible.

The EPDP Phase 2 work has been chartered to develop consensus policy recommendations related a Standardized System for Access and Disclosure (SSAD) for domain name registration data.

As you are aware, the GNSO Council is responsible for managing the Policy Development Process of the GNSO, while the substantive policy development work and deliberation is the responsibility of the community engaged in the working groups themselves. As such, this GNSO Council response to SAC111 will address SSAC comments related to process management while deferring discussion of substance to the ongoing and active EPDP Team and leadership.

First, the GNSO Council acknowledges the important contributions of the SSAC to the work of the EPDP Team. The GNSO Council values the contributions of all ICANN's Advisory Committees (SSAC, GAC and ALAC) who are actively engaged in this effort. The GNSO Council is acutely aware of the time, energy and effort required to participate in GNSO PDPs, and we welcome the ongoing and active engagement of all segments of the ICANN community as we develop new consensus policy recommendations for gTLDs.

Next, we would like to address the comments submitted in SAC111 related to process management. Excerpted below are the relevant SSAC comments directed to the GNSO Council with a corresponding GNSO Council response:

1. *Automation of SSAD*

   o **SSAC:** *The Phase 2 Report and its recommendations currently fall far short of what the SSAC believes is necessary and possible to address security and stability issues within ICANN's remit. The initial version of the System for Standardized Access/Disclosure (SSAD) would not deliver data in a way and at speeds that would satisfy many operational security needs, and that a better system is possible within the limitations imposed by the European Union's General Data Protection Regulation (GDPR). However, in order to move things forward today, the SSAC supports building a solid foundation that can be improved upon in a timely manner rather than holding out for an ideal system.*

   o **GNSO Council:** The GNSO Council is aware the EPDP Team obtained guidance from its outside counsel, Bird & Bird, on the topic of automation following the publication of the Initial Report. That guidance sets out some of the legal limitations with regards to automation (see here). Although operational security needs are an important consideration, the EPDP Team is also expected to consider other needs and interests and balance those with applicable legal requirements. As noted in the Initial Report, the EPDP Team is considering how to allow for evolution of the system to factor in experience gained as well as further legal guidance that may be provided by data protection authorities (DPAs).

2. *Evolution of SSAD*

   o **SSAC:** *The SSAC considers it essential that the EPDP produce a policy framework that will deliver a continual improvement process for the SSAD. Such a framework and process will be required for SSAC to support the final report. We also note that other constituencies have voiced similar concerns. Thus, we urge the EPDP team to finish its deliberation on the policy framework and include it in the final Phase 2 report.*

   o **GNSO Council:** As noted in the previous comment, the GNSO Council is aware the EPDP Team is actively working on a recommendation that allows for this evolution. A draft proposal, factoring in public comments received as well as existing processes and procedures, has been shared with the EPDP Team for its review and input. We understand this work continues and we look forward to assessing the viability of any such recommendation consistent with GNSO PDP processes and responsibilities.

3. *Financial Sustainability of SSAD*

   o **SSAC:** *The EPDP engaged in discussions about providing guidance on "financial sustainability." This topic is out-of-scope and is not contained within the EPDP Charter. This sideline effort and the time dedicated to it at the expense of critical issues raised in the charter represents a fundamental failure in the work of this EPDP.*

The SSAC recommends work in this area be suspended. The SSAC further recommends more vigorous oversight of Policy Development Processes (PDPs) by the GNSO to ensure that future PDPs be required to stay within the remit of their charters, and changes to the charter be agreed to by participating groups prior to significant effort, time, and expense being applied to a non-charter area.

- o **GNSO Council:** The GNSO Council respectfully disagrees with the assertion that consideration of the financial sustainability of the recommendations is out of scope. The PDP Manual specifically states that: "The PDP Team should carefully consider the **budgetary impacts**, implementability, and/or feasibility of its proposed information requests and/or subsequent recommendations." The PDP Manual also requires "a statement on the WG discussion concerning impact of the proposed recommendations, which could consider areas such as **economic**, competition, operations, privacy and other rights, scalability and feasibility" be included in the Initial Report (emphasis added).

4. *Legal Advice*

- o *SSAC: From a process and working group management perspective, the SSAC is very disappointed with how the process of obtaining guidance from outside counsel has been handled throughout Phase 2. There has been a lack of clarity around the decision-making process, poor communication, consensus problems, and long procedural delays. This prevented the EPDP team from receiving the timely legal advice needed to resolve important questions, the answers to which are required by the charter for a successful outcome for the EPDP. The SSAC recommends that GNSO conduct a post-mortem review of the process of obtaining guidance from outside counsel.*

- o **GNSO Council:** The SSAC is correct that the original idea behind the legal committee was that it would be representative so that decisions from the legal committee would be facilitated for the EPDP Team, but the working methods were clearly spelled out in the first meeting (see here) noting that (emphasis added): "Ultimate determinations of the Phase 2 Legal Committee will be shared **and signed off with the EPDP Team before questions are sent** to Bird & Bird". There was one specific instance in which the recommendations from the legal committee were not signed off by the EPDP Team which did result in the legal committee having to review those questions again, but all questions submitted to Bird & Bird received a timely response.

5. *Other Issues Not Required for SSAD Policy Development*

- o *SSAC: To date, important in-charter issues involving the subject areas of natural-versus-legal persons, privacy/proxy service, and data accuracy are in danger of going*

unaddressed by the EPDP, with no clear plan for how they will be examined and resolved in the short time remaining.

- o **GNSO Council:** Of these topics, the GNSO Council is aware the only issue that was specifically called out in the EPDP Phase 2 charter is natural vs. legal – the other topics were deferred from phase 1. In the addendum to the Initial Report that was published for public comment, the EPDP Team has put forward its preliminary conclusions on these topics. The EPDP Team has since received additional legal advice and the ICANN study on legal vs. natural is pending and both will inform future deliberation on the topic separately and after the SSAD recommendations are finalized by the EPDP Team. On the topic of accuracy, there has already been communication from the GNSO Council to the EPDP Team noting that "the topic of data accuracy should be deferred/decoupled from the work of the EPDP until the Council can consider the issue further" and the "Council will discuss and consider possible next steps, including establishing a small group/scoping team to establish a framework to address the issue of registrant data accuracy across policy/contracts/procedures." Further, the GNSO Council is aware that these issues have not gone "unaddressed." Rather, they have been discussed and deliberated extensively, but EPDP Team consensus has not been reached and no new information or guidance has been received that would alter the outcome of previous deliberations. As such, the GNSO Council is in active discussion about possible next steps on each of these issues and is seeking the appropriate approach to address each of them without unnecessarily delaying delivery of policy recommendations related to the SSAD.

6. *SSAC Conclusion Statement*

- o *SSAC: In conclusion, the SSAC makes the following recommendations to the EPDP team and the GNSO Council:*

  - *SSAC: The EPDP team should finish its deliberation on the policy framework for the continual improvement process for the SSAD and include it in the Phase 2 Final Report.*

  - o **GNSO Council:** We support the development of an appropriate mechanism to evolve the SSAD and welcome its inclusion in the Phase 2 Final Report. Any such mechanism must respect the role of the GNSO PDPs in developing and amending gTLD Consensus Policies.

  - *SSAC: The GNSO Council should direct the EPDP team to suspend work on financial sustainability. Text regarding it should be removed from the Phase 2 Final Report, and any work developed so far can be passed along to a follow-on policy working group's charter.*

- o **GNSO Council:** As noted above and covered in the PDP Manual, the GNSO Council does not consider financial sustainability of the recommendations put forward as out of scope.

- **SSAC:** *The GNSO Council should ensure that future PDPs stay entirely within the remit of their charters, regardless of the desire of a majority of participants to explore other areas. If such areas are identified by a PDP, then the charter must be modified and agreed to by participating groups prior to significant effort, time, and expense being applied to a non-charter area.*

- o **GNSO Council:** The GNSO Council is fully committed to ensuring effective and efficient management of GNSO's Policy Development Process. Implementation of PDD 3.0 improvements will continue to guide and assist both the GNSO Council and PDP Working Group leadership in ensuring adherence to charters, the PDP Manual, and ICANN's Bylaws. Importantly, if participants in a GNSO PDP Working Group believe any of these are being violated, they have an opportunity and responsibility to alert the PDP leadership and GNSO Council Liaison so the GNSO Council can be alerted and advised through proper channels. To our knowledge, these concerns were not formally raised within the EPDP Team with the Chair, Vice Chair and GNSO Council Liaison.

- **SSAC:** *The GNSO Council should consider the comments the SSAC has provided in Section 2 of this document in its deliberations on accepting the recommendations of the EPDP and any subsequent implementation of the approved recommendations.*

- o **GNSO Council:** The GNSO Council will fully consider the output of the EPDP Team, including the levels of consensus reached within the EPDP Team in its Final Report. To reiterate, the GNSO Council is responsible for managing the process and ensuring all procedures were followed appropriately, but the substantive work is done at the PDP working group level.

In conclusion, the GNSO Council very much welcomes and appreciates the participation of ICANN's Advisory Committee representatives in the gTLD Policy Development Processes under our remit. We look forward to receipt of the EPDP Phase 2 Final Report and will execute our responsibilities as required by ICANN's Bylaws and GNSO Operating Procedures. If SSAC members of the EPDP Team have any procedural concerns, they should raise them with the EPDP Chair, Vice Chair and GNSO Council Liaison so the GNSO Council can be made aware and consider appropriate action.